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Attorney for Defendant, Captain Rollin Heassler

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JASON O. WATSON, an individual,

Plaintiff,

vs.

CAPT. ROLLIN R. HEASSLER, an individual,

Defendant.

Civil Action No.: CV-08-01851 JCS

**NOTICE OF MOTION, MOTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO SET ASIDE DEFAULT
[FRCP 55(c)]**

Hearing Date: Friday, June 27, 2008

Time: 9:30 a.m.

Courtroom: A, 15th Floor

Hon. Magistrate Judge Joseph C. Spero

I. NOTICE & MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on Friday, June 27, 2008 at 9:30 a.m. in Courtroom A, 15th Floor, Defendant Capt. Rollin Heassler, will and does hereby move the Court pursuant to Rule 55(c) of the Federal Rules of Civil Procedure to set aside the default entered by the Clerk on May 15, 2008. This motion is brought on the grounds that good cause exists to set aside the default entered by the Clerk. Mistake, inadvertence, surprise and excusable neglect caused the delay in Defendant filing his response to Plaintiff's Complaint. Defendant has a good and meritorious defense to the claims for relief alleged and a good and meritorious counterclaim. Accordingly, Defendant Capt.

**NOTICE OF MOTION, MOTION AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION TO SET ASIDE DEFAULT**

1 Heassler respectfully requests that the default be set aside and that he be permitted to file a
 2 response in this action so the parties' respective claims may be decided on their merits.

3 This motion is based on this Notice of Motion and Motion, the Memorandum of Points and
 4 Authorities, the Declaration of Capt. Rollin R. Heassler in Support of Motion to Set Aside Default
 5 ("Heassler Decl.") filed herewith, and upon such other evidence and law as may be presented to
 6 the Court at the time of the hearing.

7 **II. MEMORANDUM OF POINTS & AUTHORITIES**

8 **A. RELEVANT FACTS**

9 The Defendant in this action, Rollin R. Heassler, is an active-duty Captain in the United
 10 States Army who previously served combat duty in Iraq and is presently the Recruiting Company
 11 Commander for the San Francisco Bay Area ("Capt. Heassler"). *See* Heassler Decl. at ¶1. As a
 12 pastime, Capt. Heassler maintains an Internet website which provides news, information and
 13 commentary regarding college basketball, www.collegehoopsupdate.com. *See* Heassler Decl. at
 14 ¶3.

15 In January 2008, Plaintiff's counsel, Ms. Carolyn E. Wright of the Law Offices of Carolyn
 16 E. Wright, LLC, and Buckley Brown P.C. contacted Capt. Heassler regarding his alleged
 17 infringement of Plaintiff's copyright. *See* Heassler Decl. at ¶4. Plaintiff's counsel gave Capt.
 18 Heassler until February 22, 2008 to resolve this dispute. *See id.* Plaintiff's counsel demanded
 19 immediate payment of \$10,000 from Capt. Heassler, and indicated that if Capt. Heassler failed to
 20 pay the demanded sum he would be subject to a court martial for alleged violation of General
 21 Article 134 of the Uniform Code of Military Justice ("UCMJ"). *See id.* Capt. Heassler attempted
 22 to resolve this matter informally, but Plaintiff's counsel arbitrarily shortened Capt. Heassler's time
 23 to resolve this dispute from February 22, 2008 to February 8, 2008. *See* Heassler Decl. at ¶5.

24 Plaintiff served Capt. Heassler with the Complaint in this action on or about April 8, 2008. *See id.*

25 Immediately upon receiving the Complaint, Capt. Heassler began to investigate the legal
 26 issues in the case and the procedure he needed to follow in order to file his response. *See* Heassler
 27 Decl. at ¶6. Capt. Heassler promptly prepared an ECF Pro Se Registration application and sent it
 28 to the Court so he would be able to electronically file his response as required. *See id.* Between

1 approximately April 28, 2008 and May 4, 2008, Capt. Heassler was required by the U.S. Army to
2 go on temporary duty out of town. *See* Heassler Decl. at ¶7. As a result, Capt. Heassler was
3 unable to take any further steps in his defense during that period. *See id.*

4 Since filing his ECF Pro Se Registration Application form, Capt. Heassler has been
5 awaiting confirmation from the Court that he would be permitted to electronically file his
6 response. *See* Heassler Decl. at ¶8. Capt. Heassler did not receive any such notification because
7 he may not have fully understood and complied with the Court's procedures in that regard. *See id.*

8 Capt. Heassler also mistakenly believed that he had until June 7, 2008 to file his response
9 because the Summons clearly indicated that if he were an officer or employee of the United States,
10 which he believed he was as an active-duty Captain in the United States Army, he would have
11 sixty (60) days to respond to the Complaint rather than twenty (20) days. *See* Heassler Decl. at ¶9.
12 To Capt. Heassler's surprise, default was entered by the Clerk on May 15, 2008. *See* Heassler
13 Decl. at ¶10. Given the legal and procedural complexities Capt. Heassler encountered in
14 attempting to defend against this action, Capt. Heassler had no choice but to retain counsel to
15 assist him, and did so recently. *See id.*

16 **B. APPLICABLE LAW**

17 Federal Rule of Civil Procedure 55(c) provides, in pertinent part, that "[t]he court may set
18 aside an entry of default for good cause" *See* Fed. R. Civ. Proc. 55(c) (West 2008).

19 Default judgments are generally disfavored and any doubts regarding the propriety of a
20 default are usually resolved against the party seeking default judgment. *See Peña v. Seguros La*
21 *Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985).

22 **C. ARGUMENT**

23 Defendant Capt. Heassler, respectfully contends that good cause exists to set aside the
24 default entered by the Clerk on May 15, 2008. Capt. Heassler is unfamiliar with the Court's
25 procedures for responding to such actions. Capt. Heassler misunderstood his deadline to respond
26 to the Complaint because the Summons explained that he would have sixty (60) days to respond to
27 the Complaint if he were an officer or employee of the United States, which he believed he was as
28 an active-duty Captain in the United States Army. Capt. Heassler did not fully understand Federal

1 Rule of Civil Procedure 12(a)(3) in this regard. Capt. Heassler promptly attempted to register as a
2 Pro Se ECF filer by filing the required application form. However, it is not clear whether Capt.
3 Heassler successfully completed that process. Capt. Heassler's efforts to appear in this matter
4 provide objective evidence of Defendant's intent to defend against this action. Under the
5 circumstances, Capt. Heassler respectfully contends that his neglect to timely file his response in
6 this action was due to mistake, inadvertence, surprise and excusable neglect. Capt. Heassler
7 further contends that, due to the promptness of this Motion, Plaintiff will not be prejudiced by a
8 granting of the sought relief.

9 Capt. Heassler further respectfully contends that he has a good and meritorious defense to
10 the claims for relief alleged in this action, including, *inter alia*, the Fair Use Doctrine. In addition,
11 Capt. Heassler contends that he has good and meritorious counterclaims against the Plaintiff based
12 on the facts of this case, including, *inter alia*, extortion.

13 Accordingly, Defendant Capt. Heassler respectfully requests that the default entered by the
14 Clerk on May 15, 2008 be set aside for good cause and that Defendant be permitted additional
15 time to file a response in this action so the parties' claims may be fully decided on their merits.

16 Dated: May 19, 2008

THE MORALES LAW FIRM

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18 By: 

19 DAVID MORALES

20 Attorney for Defendant Capt. Heassler
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7 UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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10 SAN FRANCISCO DIVISION

11 JASON O. WATSON, an individual,

12 Plaintiff,

13 vs.

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15 CAPT. ROLLIN R. HEASSLER, an
16 individual,

17 Defendant.

Civil Action No.: CV-08-01851 JCS

**DECLARATION OF CAPT. ROLLIN R.
HEASSLER IN SUPPORT OF MOTION
TO SET ASIDE DEFAULT [FRCP 55(c)]**

Hearing Date: Friday, June 27, 2008
Time: 9:30 a.m.
Courtroom: A, 15th Floor

Hon. Magistrate Judge Joseph C. Spero

18
19 **DECLARATION**

20 I, Rollin R. Heassler, declare:

21 1. I am a party in the above action and I am providing the following information
22 from my personal knowledge.

23 2. I am an active-duty Captain in the United States Army. I previously served
24 combat duty in Iraq and am presently the Recruiting Company Commander for the San
25 Francisco Bay Area.

26 3. As a pastime, I maintain an Internet website, www.collegehoopsupdate.com,
27 which provides news, information and commentary regarding college basketball.
28

**DECLARATION OF CAPT. ROLLIN R. HEASSLER IN SUPPORT OF MOTION
TO SET ASIDE DEFAULT [FRCP 55(c)]**

1 4. In January 2008, Plaintiff's counsel, Ms. Carolyn E. Wright of the Law Offices
2 of Carolyn E. Wright, LLC, and Buckley Brown P.C. contacted me regarding my alleged
3 infringement of Plaintiff's copyright. In her letter, Plaintiff's counsel explicitly gave me
4 until February 22, 2008 to resolve this dispute. Plaintiff's counsel demanded immediate
5 payment of \$10,000 from me, and indicated that if I failed to pay the demanded sum I
6 would be subject to a court martial for alleged violation of General Article 134 of the
7 Uniform Code of Military Justice ("UCMJ").

8 5. I attempted to resolve this matter informally, but Plaintiff's counsel arbitrarily
9 shortened my time to resolve this dispute from February 22, 2008 to February 8, 2008. I
10 was ultimately served with the Complaint in this action on or about April 8, 2008.

11 6. Immediately upon receiving the Complaint, I began to investigate the legal
12 issues in the case and the procedure I needed to follow in order to file my response. I
13 promptly completed an ECF Pro Se Registration application form and sent it to the Court
14 so I would be permitted to electronically file my response as required. I believe my
15 actions objectively demonstrate my intent to defend against this action.

16 7. Between approximately April 28, 2008 and May 4, 2008, I was required by the
17 United States Army to go on temporary duty out of town. As a result, I was unable to take
18 any further steps in my defense during that period of time.

19 8. Since filing my ECF Pro Se Registration Application form, I have been awaiting
20 confirmation from the Court that I would be permitted to electronically file my response. I
21 never received any such notification. I am not certain whether I fully understood and
22 complied with the Court's procedures in that regard.

23 9. When I reviewed the Summons in this matter, I noted that it explicitly provided
24 that if I were an officer or employee of the United States, which I believe I am as an
25 active-duty Captain in the United States Army, I would have sixty (60) days to respond to
26 the Complaint rather than twenty (20) days. Based on that information, I believed that I
27 would have until approximately June 7, 2008 to file my response. I am not certain whether
28 my understanding regarding my filing deadline was correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 19, 2008.

By: RCR
CAPT. ROLLIN R. HEASSLER

**DECLARATION OF CAPT. ROLLIN R. HEASSLER IN SUPPORT OF MOTION
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11 JASON O. WATSON, an individual,

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14 CAPT. ROLLIN R. HEASSLER, an
15 individual,

16 Defendant.

Civil Action No.: CV-08-01851 JCS

**[PROPOSED] ORDER GRANTING
DEFENDANT'S MOTION TO SET
ASIDE DEFAULT [FRCP 55(c)]**

Hearing Date: Friday, June 27, 2008

Time: 9:30 a.m.

Courtroom: A, 15th Floor

Hon. Magistrate Judge Joseph C. Spero

17
18 **[PROPOSED] ORDER**

19 The Court, having read and considered all of the papers submitted with respect to
20 Defendant's Motion To Set Aside Default, and having heard the arguments of counsel, if
21 any, and good cause appearing therefore, IT IS HEREBY ORDERED pursuant to Federal
22 Rule of Civil Procedure 55(c) (West 2008) that the default entered in this matter on May
23 15, 2008 is hereby set aside. IT IS FURTHER ORDERED that Defendant shall have until
24 _____, 2008 to file a response to the Complaint in this matter.

25 IT IS SO ORDERED.

26 Dated: June ___, 2008

27 _____
Honorable Joseph C. Spero
28 Magistrate Judge Of The U.S. District Court

**[PROPOSED] ORDER GRANTING DEFENDANT'S MOTION TO SET ASIDE
DEFAULT [FRCP 55(c)]**